United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21486

WILLIAM J. WHITE

Appellant

232

v.

ARCHIE PARNELL, administrator of
the estate of Rhoda W. Parnell, deceased

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 15 1968

Nathan J. Paulson
CLERK

CARLISLE E. PRATT
SHELLIE F. BOWERS
Suite 500, Barrister Building
635 F Street, N. W.
Washington, D. C. 20004

Attorneys for Appellant

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21486

WILLIAM J. WHITE

Appellant

v.

ARCHIE PARNELL, administrator
of the estate of Rhoda W. Parnell, deceased

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATEMENT OF QUESTION PRESENTED

Whether a surviving tenant by the entireties, who is now sole owner of certain real estate by survivorship, is entitled to contribution from the personal estate of his deceased co-tenant toward payment of jointly-executed promissory notes secured by deeds of trust on said realty.

INDEX

INDEX (cont.)

TABLE OF CITATIONS

Cases	Pages
Maresh v. Jennings, 38 S. W. 2d 406 (Tex. Civ. App. 1931)..	8, 12
Minnesota Trust Co. v. Peteler, 132 Minn. 277, 156 N. W. 255 (1916)....................................	17
*Ratte v. Ratte, 260 Mass. 165, 156 N. E. 870 (1927).	5
Rell v. Combes, 25 Ohio App. 476, 159 N. E. 133 (1927)...	10, 12
Slater v. Keleket X-Ray Corp., 172 F. Supp. 715 (D. C. D. C. 1959)..................................	15
State Planters Bank v. Randolph, 207 N. C. 241, 176 S. E. 561 (1934).....................................	17
*Teas v. Kimball, 257 F. 2d 817 (5th Cir. 1958).......	19
Universal State Bank v. Steeves, 85 Wash. 55, 147 P. 645 (1915)..	18
Waters v. Waters, 110 Conn. 342, 148 A. 326 (1930)...	9
*Willard v. Wood, 1 App. D. C. 44, affirmed 164 U. S. 502 (1896).....................................	17, 19

* Cases principally relied upon.

Treatise

2 POMEROY, EQUITY JURISPRUDENCE, (5th Ed. 1941).	8

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1291, to review the action of the District Court in overruling the objection of appellant heir to the First and Final Account of appellee administrator - the order overruling same having been entered on October 2, 1967, and notice of appeal therefrom having been timely filed on October 17, 1967.

STATEMENT OF THE CASE

By deed dated October 10, 1963, Archie Parnell and his wife, Rhoda, acquired from one Melvyne Friedman the title to certain real estate situate in the District of Columbia, to wit: Lot 23 in Square 3054, improved by premises 629 Harvard Street, N. W., as tenants by the entirety (Liber 12091 at folio 446). On that same day, to finance the purchase, they executed two promissory notes, each secured by a purchase-money trust on the property. The first, to secure a $10,000 loan from Lincoln Federal Savings and Loan Association (Liber 12091 at folio 448) and the second, to secure the $2,950 balance due to Friedman on the purchase price (Liber 12091 at folio 452). On July 8, 1966, Rhoda Parnell died intestate, leaving surviving her Archie Parnell, her widower, and William White, an adult brother. At the time of death, the balance on the first and second trust notes was

$9322.36 and $2456.79, respectively. The realty encumbered by said notes has an assessed value of $6,539.

Upon his application, Archie Parnell was appointed, and subsequently qualified, as administrator of the estate of his deceased wife (Admin. No. 117,357). In his First and Final Account as administrator, filed on May 17, 1967, Parnell claimed credit and allowance for disbursements to himself in the amounts of $4661.18 and $1228.39, as contribution from his deceased wife's personal estate in the amount of one-half of the balance owing on each of the aforementioned secured notes at the time of her death. Appellant, whose distributive share as brother and sole heir of the intestate, was reduced by $2944.79 as a result of these claimed disbursements, filed an objection to the administrator's account, claiming that the decedent's personal estate owed no duty of contribution to the surviving tenant by the entireties, toward payment of the trust notes encumbering his property. On September 27, 1967, the Objection came on for hearing before the Honorable Alexander Holtzoff, who, after oral argument, overruled same. Subsequently, on October 2, 1967, a written order was entered overruling said objection. It is from the foregoing order that this appeal is prosecuted.

STATEMENT OF POINT

Since upon the death of a co-tenant by the entireties, the property so held passes entirely to the surviving tenant by surviorship - with the estate of the deceased co-tenant acquiring no interest therein - it would be inequitable to require said estate to contribute toward payment of the jointly-executed encumbrances thereon.

SUMMARY OF ARGUMENT

1. Where, as in the instant case, payment of the joint debt by the surviving obligor confers only an illusory benefit upon the estate of the deceased co-obligor, and contribution by said estate would result in an unjust enrichment (indeed,a windfall) to the surviving co-tenant of the encumbered property, it would be inequitable to require contribution toward payment of said obligation from the estate.

2. Because of the advent of homeowner's mortgage insurance in real estate transactions since the date of its rendition, and because of its irreconcilability with the District's own law of subrogation, the holding in the Maryland case of Cunningham v. Cunningham is not binding upon, nor should be awarded any deference, by this Court.

ARGUMENT

I. STATEMENT OF THE TWO LINES OF DECISIONS IN OTHER JURISDICTIONS REGARDING THE QUESTION OF CONTRIBUTION RAISED BY THIS APPEAL

This is a case of first impression in the District of Columbia. In other jurisdictions, there is a conflict of authority as to whether a surviving spouse who discharges a joint mortgage debt on property held by the entirety has a right of contribution against the deceased spouse's estate. One view, allowing contribution, proceeds on the theory that the decedent's estate has been benefited by the payment of the joint obligation because said payment satisfied a possible claim against the estate. Liability to contribute is based on the rule that when a joint obligation is discharged by only one obligor, he should receive from the other obligors what he has paid on their behalf. In this view, the joint debt is deemed to be the source of the common burden giving rise to the right of contribution.1/ The other view, denying contribution, proceeds on the theory that at the time when the debt is paid there is no common burden upon the land subject to the mortgage lien because the title has passed to the surviving spouse. The debt is treated as a mere incident to the mortgage lien, and the right to contribution between joint debtors thus is

---

1/ In Re Keil's Estate, 51 Del. 351, 145 A. 2d 563, 76 A. L. R. 2d 996 (1958); Cunningham v. Cunningham, 148 A. 444, 67 A. L. R. 1176 (Md. 1930). Brown v. Hargraves, 96 S. E. 2d 788 (Va. 1957).

made to depend upon the nature of the tenancy of the co-obligors. The land is said to be the primary fund for the payment of the debt and therefore carried the entire burden of payment to the surviving joint tenant or surviving tenant by entirety.[2]

In Lopez v. Lopez,[3] a leading case denying contribution in a factual situation identical to the instant case, the Court, after disclosing that the case was one of first impression in Florida, stated the theory under which other jurisdictions had denied contribution in the following words:[4]

> These cases proceed, in general, on the theory that the nature of the obligation of the deceased spouse is to be considered in light of the incidents of ownership of the property which is security for the debt, that the husband and wife each own the whole of the estate, and that the burden of the mortgage debt follows the security. They also consider that inasmuch as the personal estate of decedent is not enriched or benefited by the debt, the survivor should not be entitled to contribution.
>
> The case of Ratte v. Ratte (156 N. E. 870) makes clear the significance of the manner in which the title to property involved is held since in that case contribution was allowed on a mortgage debt on property held by the spouses as

2/ Lopez v. Lopez, 90 So. 2d 456 (Fla. 1956); Ratte v. Ratte, 260 Mass. 165, 156 N. E. 870 (1927); Geldert v. Bank of New York, 209 App. Div. 581, 205 NYS 238 (1924).
3/ supra, note 2.
4/ 90 So. 2d at 458.

> tenants in common, but was not allowed on property held in an estate by the entireties, although both spouses had each executed the one mortgage and note for which both properties were security.

And stated its own reasoning as follows:5/

> When one of the tenants by the entirety dies, the surviving tenant receives no new or greater estate than already possessed, but the interest of the deceased tenant ceases. It is in our opinion unconscionable and inequitable to allow the law to take from one his interest in lands, yet hold him responsible for a part of the purchase price thereof which remains unpaid...
>
> It is clear to us that in a case such as here, the estate of the decedent receives no benefit or enrichment which, in equity, requires or justifies contribution being made to the surviving spouse. On the other hand the survivor received all of the estate for which the obligation was incurred and cannot be heard to complain.

The reasoning of the "other" line of cases is exemplified by the following remarks in Re Keil's Estate6/

> A joint and several obligation of two parties, whether or not husband and wife, creates an obligation which is, on its face, for the benefit of both. Upon the death of one party his estate is still liable for the debt. And if the right of contribution, upon payment of the debt during the lifetime of both, is an attribute of the joint

5/ Id. at 458-459.
6/ 145 A. 2d at 565, 76 ALR 2d at 1001.

> liability, we fail to see why it does not exist upon payment made after the death of one. The payment of the debt by the survivor is certainly a benefit to the estate because it discharges a liability of the estate.

It is also typified by the observation in Cunningham v. Cunningham that "as between joint and equal principles, the right of proportionate contribution exists... and that right is assertable against the estate of a deceased co-principal".[7/]

Comparison of the two views indicates that the point upon which the courts are divided is the question of deciding which of two factors is of paramount importance - the benefit conferred upon the estate of the deceased co-obligor by the survivor's payment of the joint debt or the unjust enrichment to the surviving sole owner of the property if the estate of his deceased co-obligor - which receives no interest in the property - is required to pay one-half of the amount of the encumbrances thereon. Let us now examine seriatum these conflicting considerations.

7/ 148 A. at 447, 67 ALR at 1181.

II. THE "BENEFIT" CONFERRED UPON DECEDENT'S ESTATE BY THE SURVIVING CO-TENANT'S PAYMENT OF THE ENTIRE DEBT WOULD BE MORE ILLUSORY THAN REAL; HENCE, NOT A VALID BASIS FOR REQUIRING CONTRIBUTION FROM SAID ESTATE

"As between joint debtors a joint obligation establishes nothing beyond showing a joint liability on the part of the debtors to the creditor. The question as to what proportion of the debt each defendant should pay, or the right to contribution at all, is a matter resting entirely between the joint debtors; it is not in any way adjudicated by the responsibility of the debtors to the creditor".[8/] Rather, it rests upon the equitable principle that one should not be made to bear more than his just share of a common burden to the advantage of his co-obligors;[9/] it therefore appears to be essentially a partial reimbursement for the benefit conferred upon the non-paying obligor. In the typical joint debt situation the advantage which the courts find conferred on the non-paying co-obligor appears in one of two forms. It can be found in either the proceeds of the debt which each co-obligor presumably receives[10/], or in the discharge of a debt for which each is primarily liable.[11/] In many cases the non-paying obligor is

8/ Bramhall, J., dissenting in Re Keil's Estate, 145 A. 2d at 567, 76 ALR 2d at 1002.
9/ 2 POMEROY, EQUITY JURISPRUDENCE, 5th Ed. 157 (1941).
10/ Maresh v. Jennings, 38 S. W. 2d 406 (Tex. Civ. App. 1931); Manning v. Campbell, 204 N. Y. S. 2d 718 (1960).
11/ Brown v. Hargraves, 198 Va. 748, 96 S. E. 2d 788 (1957).

substantially benefited in both ways.[12/] In the instant case, however, it would seem that neither of these benefits is sufficiently present to afford an equitable basis for contribution. Upon the death of Mrs. Parnell her husband, by operation of law, obtained all the benefits of the proceeds of the joint debt by becoming sole owner of the property. While the decedent was benefited by the use and occupancy of the premises acquired by virtue of the joint obligation during her lifetime, the providing of shelter is a type of "benefit" that a husband is both morally and legally compelled to confer upon his wife, regardless of whether or not she joined him in signing any promissory notes pertaining thereto. The courts allowing contribution find a benefit in the fact that the decedent's estate is discharged from liability on the joint debt by the survivor's payment thereof. But while the removal of a legally enforceable claim against the estate is clearly of some benefit to it, such a benefit does not seem sufficiently substantial to warrant the application of equitable contribution doctrines. To assume that the creditors would resort to an action on their notes, leaving the security untouched, would evidence complete unfamiliarity with the customary practices of secured creditors.

12/ See, e. g. Waters v. Waters, 110 Conn. 342, 148 A. 326 (1930).

A more realistic assumption would be that, in the event of default in payments on the notes, there would ensue foreclosure and sale of the property under the applicable deed of trust. In that event an action in personam against the note makers would lie only if the proceeds received from the sale were insufficient to satisfy the balance due under the notes. The property involved in the instant case has a current assessed value of $6,539. Using the formula that assessed value = 55% of market (a rule of thumb employed by assessment office), the current market value of the property is $11,889. At the time of death of the deceased co-obligor, the balance due under both notes combined equalled $11,779.15. This combined balance is probably a little less now, nearly a year having elapsed since co-obligor's death, on July 28, 1966. Under the above circumstances, there is little likehood any personal claim would ever be filed against the decedent's estate (or asserted against the surviving spouse either, for that matter) by either of the creditors. The "benefit" to the estate, therefore, is in large part illusory. To base the right of contribution in such circumstances solely on the fact of discharge of a legal liability is to make the doctrine of contribution one of form rather than substance. 13/

13/ See Rell v. Combes, 25 Ohio App. 476, 159 N. E. 133 (1927), where the court refused to make legal liability alone the test for determining the question of contribution.

III. TO REQUIRE CONTRIBUTION FROM DECEDENT'S ESTATE WOULD RESULT IN AN UNJUST ENRICHMENT TO THE SURVIVING CO-TENANT

In Eliason v. Eliason,[14] the following clear and concise explanation of the doctrine of contribution may be found:

> The principle is, that parties having common interest in a subject matter shall bear equally any burden affecting it .... Equality is equity.

In a situation such as is involved in the instant case, the surviving co-tenant sustains no detriment in shouldering the entire responsibility for paying off the encumbrances since, as the now sole owner, he would receive the full benefit from discharge of a lien burdening his own property. On the other hand, if the decedent's estate - which receives no interest in the property - is required to contribute one-half toward payment of the encumbrances, the detriment to the estate and corresponding unjust enrichment to the survivor are apparent.

To spell out the general proposition by example: H and W purchase property worth $15,000, pay $5,000 down, and jointly execute a note and mortgage for the balance. They hold as tenants by the entireties and W

14/ 3 Del. Ch. 260, 263 (1869).

dies before the first payment is due. As surviving tenant, H now owns outright property worth $15,000, and decedent's estate and H are jointly and severally liable to the mortgagee for $10,000. If H pays off the balance due he now has unencumbered property worth $15,000, and although W's estate is free of a debt, it has no interest in, or claim to, the property in any event; equality exists between the parties. But if the estate is required to contribute $5,000 to H, he now has assets totaling $20,000 and the estate is deprived of $5,000 in satisfying a potential burden while succeeding to no interest in the land. In other words, H now owns property worth $15,000 at a cost to him of $10,000. Is this equality? Is there not, rather, a windfall?

Moreover, denial of contribution in a case such as is described above, and in the instant case, would be in accord with the general rule that if a co-obligor's expenditure in fulfilling the common obligation, in excess of his proportionate share, is equalled or more than counterbalanced by benefits which he receives from the same transaction, he is not entitled to contribution.15/

15/ Labbe v. Bernard, 196 Mass. 551, 82 N. E. 688 (1907) (Contribution denied where expenditure by surety of contractor, completing the contract, more than overcome by amount he received for the work); Rell v. Combes, supra, note 13 (Sureties on promissory note given to raise money to pay debt of principal to such sureties, who received entire benefit, held not entitled to contribution from other sureties who received none). In Rell the Court held that the duty to contribute ceases when all the proceeds of the joint debt have passed to the paying co-obligor. Similarly, it has been held that the measure of liability to contribute is determined by the proportionate interest of each obligor in the proceeds of the joint debt. See Maresh v. Jennings, supra, note 10.

IV. THIS COURT IS NOT BOUND BY, NOR OWES ANY DEFERENCE TO, THE HOLDING IN THE MARYLAND CASE OF CUNNINGHAM v. CUNNINGHAM

A. The Vitality of the Common Law is One of its Principal Characteristics

As indicated at the beginning of this Argument, there is, in the District of Columbia, no statute nor appellate decision on the subject discussed herein. Therefore, since appellee argued below that in the absence of such authorities, the District is bound to follow the common law of the State of Maryland, as enunciated in Cunningham v. Cunningham,[16/] - and since the Court below, in overruling appellant's objection to the disputed account, apparently deemed Cunningham to be persuasive [16A/] - the following discussion is set forth to show that this Court owes no blind allegiance to the holding in that case.

What was formerly "the common law" should not be followed where changes in the times, in conditions, or in the advancement of knowledge have made it obsolete. The landmark case of Durham v. United States[17/]

16/ 148 A. 444, 67 A. L. R. 1176 (1930).

16A/ The Court stated, in its oral opinion:

> Since the District of Columbia derives its common law from Maryland, decisions of the Court of Appeals of Maryland on questions that have not been determined by the Court of Appeals for this Circuit are of great weight, and perhaps of greater weight than decisions of the courts of other states. This is peculiarly true with respect to the law of real property. The Court of Appeals of Maryland, in Cunningham v. Cunningham, 158 Md. 372, held that in such a situation the right of contribution exists (Tr. 2-3).

17/ 94 U. S. App. D. C. 228, 214 F. 2d 862 (1954).

is illustrative of this proposition. There, the United States Court of Appeals, entrusted with the responsibility of formulating the test of criminal responsibility in the District of Columbia (Congress never having undertaken to define same) declared the "right-wrong" and "irresistible impulse" tests, in use since 1882 and 1929, respectively, to be obsolete and adopted a new insanity test to be followed in future cases in the District.

The following judicial quotations also reflect the principle that vitality and adaptability are hallmarks of the common law:

> The Supreme Court has clearly laid down the principles that govern our interpretation of the common law: "It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions" ..... And not only changed conditions but simply the peculiar circumstances of a particular case may justify departure from a rule of the common law to reach a sensible result .... "We act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice" 18/

> At common law contribution between tort-feasors did not exist. Modern enlightened tendencies gradually ameliorated the harshness and rigor of this doctrine. In many jurisdictions contribution as between joint tort-feasors is now provided in varying

18/ Manoukian v. Tomasian, 99 U. S. App. D. C. 57, 61, 237 F. 2d 211, 215 (1956).

> degrees. In the District of Columbia, some years ago, it was introduced by judicial decisions .... [T]his development is an illustration of the fact that the common law has not become static or petrified, but is still a living force and continues to grow and adjust itself to the needs of changing times and shifting conditions. This vitality has always been one of its principal characteristics. 19/
>
> "If, with discerning eye, we see differences as well as resemblances in the facts and experiences of the present when compared with those recorded in the precedents, we take the decisive step toward the achievement of a progressive science of law. If our appraisals are mechanical and superficial, the law which they generate will likewise be mechanical and superficial, to become at last but a dry and sterile formalism". 20/

In a comparison of the instant case with Cunningham, two differences which no doubt would be visible to "a discerning eye" are (1) the advent of homeowners' mortgage insurance in real estate transactions since the decision in Cunningham, and (2) the irreconcilability of Cunningham with the District's own law of subrogation.

19/ Holtzoff, J., in Slater v. Keleket X-Ray Corp., 172 F. Supp. 715, 717 (D. C. D. C. 1959).

20/ McGuire, Justice, in Bonbrest v. Kotz, 65 F. Supp. 138, 142 (D. C. D. C. 1946), quoting Cheif Justice Stone, Common Law in the United States.

B. The Advent of Homeowner's Mortgage Insurance Since Cunningham Was Decided

Cunningham was decided in 1930, at a time when homeowners' mortgage insurance was practically unheard of. Today, this is a very popular type of protection about which practically every purchaser of real estate is conversant and with which a large number of said purchasers are covered. Generally, under this type of insurance, upon the death of the principal wage earner the entire balance due on the encumbrance is paid by the carrier, and upon the death of the co-tenant who is not the principal wage earner, one-half of the balance due on the encumbrances is paid by the carrier. And it is not critical to establish that the purchasers in the instant case did, in fact, have such coverage. The mere fact that they "may" have availed themselves of this form of protection, prevalent today, should give this Court pause before accepting as "authority" a decision rendered thirty-seven years ago which, even in its own jurisdiction, might not today be considered a sound application of the equitable doctrine of contribution.

C. The Irreconcilability of Cunningham With the District of Columbia's Own Law of Subrogation

There are two situations analogous to the case at bar, in each of which the equitable doctrine of subrogation comes into play. The first is the case of a mortgagor who sells his property to a stranger who either

assumes, or takes subject to, the mortgage. Here, the purchaser is, as between himself and his vendor, the principal debtor, while the liability of the vendor to the mortgagee is that of surety.21/ It is to be noted that here the one formerly the owner and primarily liable now has no interest in the property and is only secondarily liable. Should the grantee pay off the note, naturally he would be denied contribution from his grantor.22/ The second is the case of a joint tenant co-mortgagor who sells his interest to his co-tenant. Here too, as between the former co-tenants, the grantor is reduced from a principal debtor to a surety. And here, too, the new owner of both interests should be denied contribution were he to pay off the debt. This second situation is more analogous to the instant case. It should make no difference that the present sole owner acquired his co-tenant's interest by purchase or by survivorship. In both of the above mentioned situations a party who formerly had an interest in the property now has no interest, and his liability is reduced from primary liability to secondary liability. And it would be contrary to all known equitable principles to allow the principal debtor to recover contribution from the surety - i. e. the estate, in this instance.

21/ Willard v. Wood, 1 App. D. C. 44, affirmed 164 U. S. 502, 41 L. Ed. 531 (1896); Howard v. Burns, 279 Ill. 256, 116 N. E. 703 (1917); Minnesota Trust Co. v. Peteler, 132 Minn. 277, 156 N. W. 255 (1916); State Planters Bank v. Randolph, 207 N. C. 241, 176 S. E. 561 (1934).
22/ Dodds v. Spring, 174 Cal. 412, 161 Pac. 351 (1917).

Indeed, in situations such as set forth above, not only is the present owner of the property denied contribution, but the former owner, if compelled by the mortgagee to make payments under his obligation, is subrogated to all of the rights of the mortgagee against the present owner. The following language, in the New York case of Johnson v. Zink,[23] is illuminating:

> The conveyance by the mortgagor of the mortgaged premises "subject to" the mortgage in question, to Comstock, conveyed to him the equity of redemption only ... and as between those parties it is clearly equitable that such discharge and satisfaction (of the mortgage) should be made out of the said premises, and that the obligor and mortgagor should not, in exoneration thereof, be called upon to pay the same out of his individual property. The effect of the transaction was in equity to make the land the primary fund for the payment of the debt, and to place the plaintiff (mortgagor-vendor) in the position of surety therefor only ... This relation between the mortgagor and his grantee does not deprive the obligee from enforcing the bond against the obligor. He is entitled to his debt, and has a right to avail himself of all his securities.

23/ 51 N. Y. 333 (1873). See also Universal State Bank v. Steeves, 85 Wash. 55, 147 Pac. 645 (1915).

> Equity, however, requires that the obligor, on the payment of the debt out of his own funds, should be subrogated to the rights of the obligee, so that he can reimburse himself by a recourse to the mortgaged premises for that purpose. This cannot prejudice the creditor, and it is clearly equitable as between the debtor and the owner of the land.

Thus, under the above case, if the mortgagor (former owner) pays the debt, he is entitled to have a lien impressed upon the land, upon which he may foreclose and recoup the total amount that he paid on the debt since the transfer of the property.[24]

Conversely, as indicated in Willard vs. Wood[25] an "assumption of the mortgage" case arising in this jurisdiction, if, in the event of default, the mortgagee forecloses on his security rather than bringing an action on the note against the former owner-obligor, the latter may

---

24/ See also Teas v. Kimball, 257 F. 2d 817 (5th Cir. 1958), wherein the court commented, at 825:

> Upon the transfer of title to the appellee and the assumption by her of the secured obligations she became, at least as between the appellant (vendor) and herself, primarily liable on the notes ... In the event the appellant is required to pay the mortgage debt the doctrine of equitable subrogation will be applied and the lien may be kept alive for his protection.

25/ supra, note 21.

take judicial action to have the resulting deficiency, if any, chargeable entirely to the present owner of the land.26/

Finally, it must be noted that the District of Columbia subscribes to the rule requiring liberal application of the doctrine of subrogation.27/ And since, in applying that doctrine to the instant case, the estate (1) would have a lien upon the property in the amount of any payment if made toward the encumbrances, and (2) could, under District law, compel from the surviving spouse complete exoneration from any deficiency after foreclosure, the rule of contribution enunciated in the Cunningham case obviously should be rejected in the District of Columbia.

26/ And, although the "assumption" was made for the benefit of the grantor only, and created no direct obligation of the purchaser to the mortgagee, the court stated that the latter, being subrogated to the rights of the mortgagor, could sue the defaulting purchaser on any deficiency remaining after foreclosure and sale.

27/ Burgoon v. Lavezzo, 68 App. D. C. 20, 92 F. 2d 726, 113 A. L. R. 944 (1937).

CONCLUSION

WHEREFORE, Appellant respectfully submits that the order overruling his objection to appellee's First and Final Account should be reversed and the cause remanded with instructions that said objection be sustained.

Respectfully submitted,

Carlisle E. Pratt

Carlisle E. Pratt

Shellie F. Bowers

Shellie F. Bowers
Suite 500, Barrister Building
635 F Street, N. W.
Washington, D. C. 20004

Attorneys for Appellant

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,486

WILLIAM J. WHITE,

Appellant,

v.

ARCHIE PARNELL, Administrator of the Estate of Rhoda W. Parnell, deceased,

Appellee.

Appeal from the United States District Court for the District of Columbia

BENJAMIN F. ROSSNER
910 - 17th Street, N. W.
Washington, D. C. 20006
Attorney for Appellee

STATEMENT OF QUESTION PRESENTED

In the case of a tenancy by the entirety where both husband and wife have made and executed promissory notes, which notes are secured by a deed of trust on real property, is the surviving husband entitled to contribution from the estate of the deceased spouse for one half (1/2) of the balance due on the notes?

INDEX

TABLE OF AUTHORITIES

Cases:

---

* Case principally relied upon.

Page

Treatise:

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,486

WILLIAM J. WHITE,

Appellant,

v.

ARCHIE PARNELL, Administrator
of the Estate of Rhoda W. Parnell, deceased,

Appellee.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Archie Parnell and his wife, Rhoda W. Parnell, now deceased, purchased premises 629 Harvard Street, N. W., Washington, D. C. on October 10, 1963, as tenants by the entirety.

In order to purchase the property, they executed two promissory notes. The first deed of trust note executed was in the original amount of $10,000.00 from the Lincoln Federal Savings and Loan Association. The second deed of trust note was in the sum of $2,950.00 due to Melvyn Friedman from whom the purchase of the house was made.

On July 8, 1966 Rhoda W. Parnell died intestate, leaving Archie Parnell, her widower, and William J. White, an adult brother.

At the time of the death of Rhoda W. Parnell on July 8, 1966, all parties agreed that the balance due on the first deed of trust note was $9,322.36 and the balance due on the second deed of trust note was $2,456.79.

The widower, Archie Parnell, was appointed and qualified as the administrator of the estate of his deceased wife in Administration No. 117,357. In his First and Final Account filed on May 17, 1967, Archie Parnell, administrator of his deceased wife's estate, claimed as contribution from his deceased wife's personal estate one half (1/2) of the balance due on each of the notes as of the time of his wife's death.

William J. White, brother of Rhoda W. Parnell, filed an objection to the husband-administrator's account, claiming that the decedent's personal estate owed no duty of contribution toward payment of the trust notes encumbering their property.

The objections of the brother to the Account of Archie Parnell on the estate of his deceased wife, Rhoda W. Parnell, were heard on September 27, 1967 by the United States District Court for the District of Columbia. An order was entered in which it was stated that previous unpublished decisions by judges of the United States District Court for the District of Columbia did allow such contribution. Further, that the District of Columbia derives its common law from Maryland and when there is no appellate decision in this jurisdiction, the law as decided in Maryland should receive great weight.

The Court then cited *Cunningham v. Cunningham*, 158 Md. 372, which held that in a situation as existed here, there is the right of contribution. The basis for the ruling enunciated by the Court was that both spouses were liable for the indebtedness, and the estate of the deceased spouse was liable for half of it and, therefore, the estate of the deceased wife was liable for contribution. The Court further stated that the equities were clearly with the surviving spouse. That husband and wife acquired the property as tenants by the entirety, presumably as a residence, and the surviving spouse took it by right of survivorship. That there was no reason why the next of kin should have a windfall, which he would if the estate of the deceased spouse was not required to contribute one half (1/2) of the payments aforementioned.

On October 2, 1967 a written order was entered overruling the objections to the account made by William J. White, brother of Rhoda W. Parnell, and this appeal was entered against said order.

STATEMENT OF POINTS

The notes were executed by both husband and wife and their obligation was as joint and equal principles. Therefore, the right to contribution exists between them in this relationship.

The right of contribution exists between those equally liable for the same debt.

SUMMARY OF ARGUMENT

1. The obligations, the notes made and executed by the husband and wife, are obligations upon which both are liable jointly and as equal principals.

2. It is the obligation of the personal representative of the decedent in this particular case to obtain contribution on account of any mortgage debt on the real estate.

3. Both husband and wife are personally liable on the notes; that liability continues after the wife's death and, therefore, constitutes a debt of her estate.

ARGUMENT

I.

THE RIGHT OF CONTRIBUTION EXISTS BETWEEN THOSE EQUALLY LIABLE ON A PROMISSORY NOTE

In a majority of jurisdictions, the Courts hold that a surviving spouse is entitled to equitable contribution out of the estate of a deceased spouse on their joint obligations even though the debt is secured by real estate which was held by them as tenants by the entirety and which, therefore, is wholly acquired by the surviving spouse as surviving tenant. See: 76 ALR 2d, Pg. 1006, Para. 2.

The reasoning of the cases supporting contribution, in effect, hold:

> 1. The joint and several nature of the obligation, combined with the application of the ordinary rule that payment by one joint debtor of more than his share of the obligation entitles him to contribute from those jointly liable with him.
>
> 2. The separation of the obligation from the property by which it is secured and for the purchase or improvement of which it was undertaken and
>
> 3. The benefit to the decedent's estate of the payment of an obligation upon which it otherwise could be found liable.

The following cases uphold the principal of one-half equitable contribution:

Re Keil's Estate, 51 Del. 351, 145 A. 2d 563;
Magenheimer v. Councilman, 76 Ind. App. 583, 125 N.E. 77;
Cunningham v. Cunningham, 158 Md. 372, 148 A. 444;
Mobile v. Barletta, 109 N. J. Eq. 119, 156 A. 483;
Re Long's Estate, 65 Pa. D. & C. 95;
Wachovia Bank and Trust Co. v. Black, 198 N. C. 219, 151 S.E. 269;
Underwood v. Ward, 239 N. C. 513, 80 S.E. 2d 267;
Montsinger v. White, 240 N. C. 441, 82 S.E. 2d 368;
Re Kershaw's Estate, 352 Pa. 205, 42 A. 2d 538;
Re Dowler's Estate, 368 Pa. 519, 84 A. 2d 209;
Re Kritz's Estate, 387 Pa. 223, 127 A. 2d 720;
Re Wonder's Estate, 56 Pa. D. & C. 444, 62 Montg. Co. L. R. 119;
Newson v. Shackleford, 163 Tenn. 358, 43 S.W. 2d 384, and
Brown v. Hargroves, 198 Va. 748, 96 S.E. 2d 788.

II.

THE LOWER COURT ON OTHER OCCASIONS HAS UPHELD THE DOCTRINE OF CONTRIBUTION

In the estate of Mary Mason Jones, Administration No. 87-422, in the United States District Court for the District of Columbia, Holding a Probate Court, Judge Holtzoff, by his order dated October 2, 1959, held under similar circumstances that exist in this case that contribution by the estate of the deceased tenant by the entirety is in order.

Judge Bolitha J. Laws, in a memorandum opinion dated October 25, 1940, in the estate of Lizzie A. Lewis, Administration No. 53-756, likewise held that the estate of the decedent was liable to contribute a one-half share.

III.

EXACT FACTS AS THEY EXIST HERE HAVE BEEN DETERMINED BY THE COURT OF APPEALS IN MARYLAND AND SHOULD BE FOLLOWED BY THIS COURT

There are no reported cases in the United States Court of Appeals for the District of Columbia. Consequently, *Cunningham v. Cunningham*, 158 Md. 372, 148 A. 444, 67 ALR 1176, must be followed. See: *Linkins v. Protestant Episcopal Cathedral Foundation of the District of Columbia*, 87 U. S. App. D. C. 351, 187 F.2d 357, which states the District of Columbia follows the common law, particularly common law derived from Maryland.

Also, see: D. C. Code 49-301 which is quoted herewith:

> "Sec. 49-301. Common law, principles of equity and admiralty, and Acts of Congress to remain in force.
>
> The common law, all British statutes in force in Maryland on February 27, 1901, the principles of equity and admiralty, all general Acts of Congress not locally inapplicable in the District of Columbia, and all Acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force in the District of Columbia on March 3, 1901, shall remain in force except insofar as the same are inconsistent with, or are replaced by, subsequent legislation of Congress."

In the case of *Cunningham v. Cunningham*, above cited, the Court determined that where a note was signed by both parties, there was a liability to contribute a one-half share. Further, see: 79 *Am Jur.*, Para. 79, Pg. 704, which states in part as follows:

> "A presumption exists of the equal liability of husband and wife as principals in consequence of their joint execution of a mortgage on an estate purchased or held by them by the entireties, including liabilities on covenants for the payment of the purchase money

> or other debts thereby secured. The right of proportionate contribution exists, however, between them as joint and equal principals, and such right is assertible against the estate of the deceased spouse. Such right is superior to the rights of heirs of real estate of the deceased spouse to have mortgages thereon paid ratably out of the deceased spouse's personalty. Payments made on such a mortgage indebtedness by one spouse are to be regarded as gifts to the other to the extent to which they relieve the latter of an equality of contribution, and not as evidence of a purpose to place him or her in the position of a surety. The spouse to whom an estate by the entireties remains by right of survivorship, not taking by descent, has no right to exoneration of encumbrances thereon out of the personal property of the deceased spouse, and this applies to a purchase-money mortgage."

IV.

THE EQUITIES ARE CLEARLY WITH THE SURVIVING SPOUSE

The lower Court which heard the matter stated in its opinion that insofar as the equities are concerned, the Court is of the opinion that they are clearly with the surviving spouse. The husband and wife acquired the property in question as tenants by the entirety, presumably as a residence. He took it by right of survivorship. There is no reason why the next of kin should have a windfall, which he would receive if the estate of the deceased spouse was not required to contribute one half of the payment made by the surviving husband.

CONCLUSION

WHEREFORE, appellee requests this Court to affirm the lower Court's decision.

Respectfully submitted,

BENJAMIN F. ROSSNER
910 - 17th Street, N. W.
Washington, D. C. 20006
Attorney for Appellee

CONCLUSION

WHEREFORE, appellee requests this Court to affirm the lower Court's decision.

Respectfully submitted,

BENJAMIN F. ROSSNER
910 - 17th Street, N. W.
Washington, D. C. 20006
Attorney for Appellee